DATUK SYED KECHIK SYED MOHAMED & ANOR

v.

THE BOARD OF TRUSTEES OF THE SABAH FOUNDATION & ORS & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: S-02-220-1997]
21 NOVEMBER 1997

CIVIL PROCEDURE: *Striking out - Grounds for - Whether 'general disinterestedness' amounts to a ground for striking out*

CIVIL PROCEDURE: *Appeal - Appeal from High Court - Function of the Court of Appeal - Whether Court of Appeal entitled to intervene in trial judge's exercise of discretion*

Two appeals arise out of two suits filed in 1979 at the High Court at Kota Kinabalu with the Sabah Foundation being the plaintiff in both suits. In the first suit, the writ was issued on 22 February 1979 and summons for directions were taken out on 18 September 1981. Following some correspondence between the solicitors for the plaintiffs and the defendants, there was a period of complete inaction on the part of the plaintiffs and their solicitors for nine years and nine months. This was followed by the next set of correspondence between 8 January to 15 November 1996. Meanwhile, the suit was transferred to the Sessions Court but upon the plaintiffs' solicitors indicating that such transfer was not suitable, it was sent back to the High Court.

In the second suit, the writ was issued on 22 February 1979. The suit was set down for trial on 11 October 1983. There were a few sets of correspondence between the plaintiffs' solicitors and the court, requesting for an early trial date but there was no response from the court.

The plaintiffs however applied for and obtained an *ex parte* mareva injunction in both suits. Subsequently, the High Court sent a notice setting down the second suit for trial on 27 January 1997. Applications to strike out were heard on 29/31 March 1997 where the learned judge dismissed both applications. The learned judge in refusing to follow the principles laid down by the Court of Appeal in *R Rajasingam v. Balwant Singh Purba* and the Federal Court in *Vasudevan v. Damodaran* held that there was no jurisdiction for striking out an action on the ground of general disinterestedness on the part of the plaintiff.

Counsel attacked the findings of the learned judge on the following grounds, namely: (i) that the plaintiffs in both actions were guilty of inordinate and inexcusable delay resulting in the defendant's loss of the testimony of two material witnesses; and (ii) that the conduct of the litigation by the plaintiffs in both cases amounted to an abuse of power.

One of the issues for consideration was whether the learned judge's appreciation of the facts in relation to the exercise of the discretion conferred upon him was correct.

Held:

Per Gopal Sri Ram JCA

[1] It is axiomatic that decisions of the Federal Court are binding on the Court of Appeal and that decisions of the Court of Appeal and of the Federal Court are binding on all courts subordinate to them. It was not open to the learned judge to hold that the Federal Court and the Court of Appeal were wrong in the statements of the principles of law they formulated in *Vasudevan v. Damodaran* and *R Rajasingam v. Balwant Singh Purba*.

[1a] The Federal Court case of *Public Finance v Natcom Development Sdn Bhd* clearly establishes the existence of the power in the High Court to strike out an action upon admitted or proved facts which go to show that a plaintiff is disinterested in pursuing an action he has brought.

[2] The Court of Appeal has no original discretion in an appeal of this nature. Its initial function on appeal is one of review only. It is only after an appellant demonstrates either a serious misdirection by the judge or that the judge has taken into account something that he should not, or that he has failed to take into account something he should have had regard to, or that the order amounts to a miscarriage or failure of justice, that this court will be entitled to intervene and exercise a discretion of its own.

[2a] On the facts of the case, the learned judge found that the plaintiffs had not breached any rules of court. He found that it was the court which was at fault. He also took into account the grave prejudice suffered by the defendants by the loss of material witnesses. He did undertake a balancing exercise which brought the scales down firmly in favour of the plaintiffs. The Court of Appeal was therefore not entitled to intervene or reverse the decision.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Kedua-dua rayuan ini timbul daripada dua guaman yang difailkan dalam tahun 1979 di Mahkamah Tinggi Kota Kinabalu dengan Yayasan Sabah sebagai plaintif di kedua-dua guaman.

Dalam guaman yang pertama, writ telah diisukan pada 22 Februari 1979 dan saman untuk arahan telah dikeluarkan pada 18 September 1981. Berikutan dengan surat-menyurat di antara peguamcara untuk plaintif dan defendan, berlakunya suatu tempoh di mana plaintif dan peguamcaranya telah tidak berbuat apa-apa pun untuk selama 9 tahun 9 bulan. Ini diikuti oleh suatu lagi set surat-menyurat di antara 8 Januari 1996 sehingga 15 November 1996. Sementara itu, guaman tersebut dipindahkan ke Mahkamah Sesyen tetapi atas kenyataan oleh peguamcara plaintif bahawa pemindahan tersebut adalah tidak sesuai, ianya telah dihantar balik ke Mahkamah Tinggi.

Dalam guaman yang kedua, writ telah diisukan pada 22 Februari 1979. Guaman telah ditetapkan untuk perbicaraan pada 11 Oktober 1983. Terdapatnya beberapa set surat-menyurat di nota peguamcara plaintif dan dengan mahkamah, meminta tarikh perbicaraan yang awal tetapi tidak ada jawapan dari mahkamah.

Walaubagaimanapun, plaintif telah memohon dan memperolehi injunksi *ex parte* Mareva dalam kedua-dua guaman. Setelah itu Mahkamah Tinggi telah menghantar notis yang menetapkan guaman kedua untuk perbicaraan pada 27 Januari. Permohonan untuk membatalkan telah didengar pada 29/31 Mac 1997 di mana hakim yang arif telah menolak kedua-dua permohonan. Hakim yang arif yang enggan menurut prinsip yang ditetapkan oleh Mahkamah Rayuan dalam kes *R Rajasingam v. Balwant Singh Purba* [1996] 2 MLJ 549 dan Mahkamah Persekutuan dalam kes *Vasudevan v. Damodaran* telah memutuskan bahawa ia tidak ada bidangkuasa untuk membatalkan suatu tindakan atas dasar bahwa tidak ada minat pada amnya di pihak plaintif.

Peguamcara telah membantah keputusan fakta hakim yang arif atas alasan-alasan berikut, iaitu: (i) bahawa plaintif dalam kedua-dua guaman adalah bertanggungjawab atas kelambatan yang melampau yang tidak dapat dimaafi yang mengakibatkan kehilangan keterangan dua orang saksi yang penting; (ii) bahawa tindakan plaintif dalam litigasi kedua-dua kes terjumlah kepada penyalahgunaan kuasa.

Satu daripada isu untuk dipertimbangkan adalah samada pemahaman fakta-fakta oleh hakim yang arif berkenaan dengan pelaksanaan kuasa budibicara yang diberikannya adalah betul.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Adalah jelas bahawa keputusan Mahkamah Persekutuan mengikat Mahkamah Rayuan dan bahawa keputusan Mahkamah Rayuan dan Mahkamah Persekutuan mengikat semua mahkamah yang lebih rendah. Maka adalah tidak terbuka kepada hakim perbicaraan untuk memutuskan bahawa Mahkamah Persekutuan dan Mahkamah Rayuan adalah salah dalam prinsip-prinsip yang dinyatakan dalam kes-kes *Vasudevan v. Damodaran* and *R Rajasingam v. Balwant Singh Purba* adalah salah.

[1a] Kes Mahkamah Persekutuan *Public Finance v. Natcom Development* dengan jelas menetapkan kuasa-kuasa yang ada di Mahkamah Tinggi untuk membatalkan tindakan atas fakta-fakta yang dibuktikan ataupun diakui yang menunjukkan bahawa plaintif adalah tidak berminat lagi untuk meneruskan tindakan yang dimulakannya.

[2] Mahkamah Rayuan tidak mempunyai kuasa budibicara pemulaan dalam suatu rayuan seperti ini. Peranan biasanya dalam rayuan adalah untuk mengkaji semula sahaja. Hanya setelah seseorang perayu dapat menunjukkan samada salah arahan yang serius oleh hakim ataupun bahawa hakim telah mengambil kira perkara-perkara yang tidak patut diambil kira, ataupun bahawa dia gagal mengambil kira suatu yang patut dipertimbangkan, ataupun perintah tersebut terjumlah kepada kegagalan ataupun penyelewengan keadilan, bahawa mahkamah ini adalah berhak mengganggu dan melaksanakan kuasa budibicaranya sendiri.

[2a] Atas fakta kes, hakim yang arif telah mendapati bahawa telah tidak melanggar peraturan-peraturan mahkamah. Dia telah mendapati bahawa Mahkamahlah yang bersalah. Dia juga telah mengambilkira prejudis yang serius yang telah dialami oleh defendan kerana kehilangan saksi-saksi yang material. Dia telah melaksanakan latihan pengimbangan yang lebih memberatkan pihak plaintif. Maka Mahkamah Rayuan adalah tidak berhak mengganggu ataupun mengubah keputusan tersebut.

[Rayuan ditolak.]

Cases referred to:
Birkett v. James [1978] AC 297 ***(refd)***
Bishop v. Felton & May (20 June 1997, unreported) ***(foll)***
Governors of the National Heart and Chest Hospital v. Chettle (28 July 1997, unreported) ***(foll)***
Grovit v. Doctor [1997] 2 All ER 417 ***(foll)***
Hongkong Bank (M) Bhd v. Raja Letchumi [1996] 4 CLJ 155 ***(refd)***
Public Finance Bhd v. Natcom Development Sdn Bhd [1996] 4 CLJ 291 ***(foll)***

R Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 ***(refd)***
Samar Mansor v. Mustafa Kamarul Arifin [1974] 2 MLJ 71 ***(foll)***
Vasudevan v. Damodaran [1981] 1 CLJ 84 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 92 r. 4

For the appellants - John Cherryman QC (Clement Skinner & Datuk Lawrence Thien with him); M/s Chau & Thien
For the respondents - Nicholas Warren QC (Alex Decena & Junior Koh with him); M/s Jayasuria, Kah & Co

[Appeals from High Court, Kota Kinabalu; Civil Suit Nos: 351 and 352 of 1979]

Reported by Mariette Peters Goh

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals before us. They tell a very sad story about the delay in the courts. All litigation involves some delay or other. But in these cases, the delay has been long and extremely unsatisfactory.

As I said, there are two appeals and they arise out of two suits filed as long ago as 1979 in the High Court at Kota Kinabalu. In each action, the Yayasan Sabah or Sabah Foundation is a plaintiff but its co-plaintiff is different in each case. The first is Civil Suit No. 351/79, the second is Civil Suit No. 352/79. After the issue of the writ, in each case, pleadings were exchanged and some preliminary steps were taken in the action. For convenience, it is necessary to deal with each suit separately, although there is some overlap between them.

In Civil Suit No. 351/79, the writ was issued on 22 February 1979. The defence was delivered on 21 August 1979 and was amended on 28 November 1979. The summons for directions was taken out on 18 September 1981 and made returnable on 26 October 1981. When the summons for directions came up for hearing, it was adjourned at the request of the defendants' counsel (not Mr. Cherryman who has appeared before us in this appeal) who said he needed time to take instructions. Then, on 18 January 1983, solicitors for the defendants wrote to their opposite number asking them to have the summons for directions restored for hearing at an early date. Two days later, the plaintiffs' solicitors wrote to the assistant registrar and in their letter of 20 January 1983 made the request. That letter was copied to the defendants' solicitors. Nothing happened. There then followed a number of letters, fifteen in all, between 21 July 1983 to 26 April 1986 from the plaintiffs' solicitors to the court. Each letter asked for the summons to be fixed for hearing. None of these letters received any

response from the court. It may be added that none of these letters were copied to the defendants' solicitors. There then followed a period of complete inaction on the part of the plaintiffs and their solicitors for nine years and nine months.

The next set of correspondence in the first action is between 8 January 1996 to 15 November 1996. These letters were also addressed to the court but received no reply. However, in October 1995 there appears to be some correspondence between the court and the plaintiffs' solicitors which indicates that the suit had been transferred to the Sessions Court. Upon the plaintiffs' solicitors indicating the suit was not suitable to be tried by the Sessions Court, it was sent back to the High Court.

On 6 January 1997, the plaintiffs applied for and obtained *ex parte* Mareva injunctions in both suits. The following day, ie, 7 January 1997, the High Court at Kota Kinabalu issued a notice of hearing to show cause why both suits should not be heard together. That notice was made returnable on 9 January 1997. The hearing on 9 January 1997 was adjourned to 15 January 1997 on which date the learned judge made an order that Suits 351/79 and 352/79 be heard together. Some two weeks later, on 30 January 1997 the solicitors for the defendants wrote to the plaintiffs' solicitors giving them notice that they would be applying to strike out both actions. Striking out applications in both suits were taken out and served on 21 February 1997. So much for the brief chronology in Suit 351/79.

In Suit 352/79, the writ was issued on 22 February 1979. The defence was delivered on 21 August 1979. The pleadings were then amended and a summons for directions was taken out. An order for directions was made on 16 March 1981. The suit was then set down for trial on 11 October 1983. I may add, for completeness, that throughout this period, there was no application by the defendants to have the suit to be struck out for disobedience of an order or for lateness in having the action set down for trial. Like the first action, there was also correspondence between the plaintiffs' solicitors and the Court. The first set of letters was between 4 January 1984 to 25 April 1986, asking "for the action to be set down for trial at an early date". The action of course had already been set down for trial. What the plaintiffs' solicitors obviously meant was that they wanted an early date for trial. Despite the unhappy language used, which has drawn some criticism from Mr. John Cherryman, learned counsel for the defendants (appellants before us), the meaning in the plaintiffs' solicitors' letters is quite clear. None of these letters received any response from the court.

Between 25 April 1986 and 28 July 1990, the plaintiffs' legal advisers fell silent. Again, for completeness, I would add that no application of any sort was taken out during this period by the defendants' solicitors to have the action struck out for dilatoriness.

Then, between 1 September 1990 to 18 March 1991 there was some further correspondence, all from the plaintiffs' solicitors to the court. Like the correspondence in Civil Suit No. 351/79, none of the letters in Civil Suit No. 352/79 were copied to the defendants' solicitors. These letters also did not receive any response from the court. Between 8 January 1996 and 2 September 1996, there followed further correspondence again from the plaintiffs' solicitors to the court, but with no effect. The remainder of the chronology in Civil Suit No. 352/79 is more or less the same as that in Civil Suit No. 351/79, including the transfer of the case to and back from the Sessions Court.

The next significant event occurred on 28 September 1996 when the High Court sent out a notice setting down Civil Suit No. 352/79 for trial on 27 January 1997.

The applications to strike out both actions came on for hearing before Ian Chin J on 27 March 1997 and were heard on 29 and 31 March 1997. In a reserved judgment delivered with commendable speed on 9 April 1997, the learned judge dismissed both applications. It is against these orders that these present appeals have been brought.

Mr. John Cherryman who appeared for the defendants in the court below and in these appeals, has attacked the findings of the learned judge on a number of grounds. I do not think that it is an unfair summary of his submissions if I were to list them out as follows:

1. The plaintiffs in both actions were guilty of inordinate and inexcusable delay. There can be no fair trial of the actions. The defendants have in the period of delay lost the testimony of two material witnesses of critical importance namely, Tun Mustapha and Tun Mohd Said Keruak. They have been severely prejudiced as a consequence of the delay.

2. The conduct of the litigation by the plaintiffs in both cases amounts to an abuse of process. The circumstances when taken together disclose a general disinterestedness on the part of the plaintiffs in the pursuit of their claims against the defendants. There is no reason why the suits should be allowed to proceed to trial.

Mr. Cherryman in support of his arguments has said there are three separate jurisdictions under which a striking out order can be made against a dilatory plaintiff.

First, in the circumstances disclosed in these cases, there is the jurisdiction under the second limb of the principle in *Birkett v. James* [1978] AC 297, 318.

Secondly, on the ground of disinterestedness amounting to an abuse of process, on the basis of the decision of this court in *Hongkong Bank (M) Berhad v. Raja Letchumi* [1996] 2 MLJ 34 and of the Federal Court in the case of *Public Finance Bhd. v. Natcom Development Sdn. Bhd.* [1996] 2 MLJ 657.

Thirdly, under the general inherent jurisdiction reserved to every court under O. 92 r. 4 of the Rules of the High Court 1980. In particular, Mr. Cherryman has drawn our attention to the phrase 'to prevent injustice or to prevent an abuse of process of the court" appearing in that rule. Counsel submits that this constitutes two separate heads, disjuncted by the word 'or' so that an applicant may succeed on the ground that an injustice will occur by allowing an action to go to trial.

Mr. Nicholas Warren who has responded to these appeals with an ability equal to that displayed by Mr. Cherryman in presenting them, has frankly conceded these heads of jurisdiction, with the qualification that the second head was never created by the two decisions to which reference has already been made. I will deal with these arguments later in this judgment.

Mr. Cherryman has pointed out that the learned judge misdirected himself finding that the plaintiffs had not been at fault, as they had not breached any rules of court. He says, fault may be established in the context of a striking out, even in the absence of a breach of the rules. In fairness to counsel, I think it is necessary to enter into a discussion of the authorities he has cited under each head of jurisdiction that he says he has invoked.

First, *Birkett v. James* [1978] AC 297. In my judgment it is unnecessary to go beyond the speech of Lord Diplock at p. 318 of the report where he said:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

As I have already stated, Mr. Cherryman relies on the second limb of the principle stated by Lord Diplock.

The next authority is the case of *Vasudevan v. Damodaran* [1981] 2 MLJ 150, which imported *Birkett v. James* into our common law. Abdoolcader J (as his Lordship then was) said at p. 150 of the report:

(a) Dismissal of action for want of prosecution

The House of Lords in *Birkett v. James*, approving the decision of the English Court of Appeal in a trilogy of appeals reported sub nominee *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229 held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curium* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation* [1981] 2 WLR 141 again restated and discussed these principles but held they do not apply to arbitration proceedings.

We would specifically refer to the propositions enunciated by Salmon LJ, in *Allen* (at p. 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

So much for the first head of jurisdiction.

Upon the second head, namely of general disinterestedness, Mr. Cherryman relies on three cases.

Firstly, the case of *Hongkong Bank (M) Bhd. v. Raja Letchumi* [1996] 2 MLJ 34 where this court said at p. 44:

In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In the present case, there is the added consideration that the bank paid lip

service obedience to the order of the Supreme Court. The circumstances of the present case, when taken as a whole, fairly support an inference that the bank is not really interested in the cases it has filed. There is, therefore, no plausible reason for allowing these suits to remain on file.

The second case is *Public Finance Bhd. v. Natcom Development Sdn. Bhd.* [1996] 2 MLJ 657 where the Federal Court expressed the view appearing in the following passages at pp. 663 and 665:

> First, there is absolutely no question of there having been a long delay on the part of the plaintiff in prosecuting the action. Those who invoke the process of the court must be prepared to act timeously in having their grievances heard. The courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest.
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> ...
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> The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be summarised thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Thirdly, the judgement of this court in *R. Rajasingam v. Balwant Singh Purba* [1996] 2 MLJ 549 where the following passages were cited from pp. 553 and 555:

> In his judgment, the learned judicial commissioner found that there was delay on the part of the respondent before the reconstruction of the file. However, the learned judicial commissioner went on to say that the delay was explained by the respondent. The learned judicial commissioner found that there was a gap between 17 May 1989 to 13 November 1989. From the evidence, it is clear that on 24 April 1989, the respondent withdrew his appeal to the Supreme Court. On 17 May 1989, the respondent filed his summons for directions. It is clear that until 15 June 1991 when the respondent's solicitors sent a letter requesting for the hearing of the summons for directions, nothing was done to have the matter proceeded with. This was followed by several reminders, the last being 6 November 1993. Until then there was no indication that the file was missing. On 13 November 1991, the senior assistant registrar wrote to the respondent's solicitor in response to the latter's letter dated 6 November 1991 informing him that the court's file was missing and suggesting that the solicitor

reconstruct the file. The reply to this letter was dated 16 July 1993 which was about 1½ years later when the necessary documents for the purpose of reconstruction was submitted to the registry. It is to be noted all the time, the appellant was never informed of this. No explanation was ever given by the respondent or his solicitor why there was a delay of 1½ years for him to send the necessary documents to the senior assistant registrar for the reconstruction of the file. It is clear that the appellant was not involved at all in the reconstruction of the file. He was not asked to help in the reconstruction of the file. In our view, no blame is to be attached to the appellant or his solicitor because neither of them knew what was going on. By the same letter, the respondent's solicitor requested for the hearing of the summons for directions. In his judgment, the learned judicial commissioner stated that the appellant [sic; respondent] gave an explanation to this delay. With the greatest respect, we are of the view that it is not an explanation at all. Even if it is, we do not think it is satisfactory and reasonable and is not acceptable. As can be seen from the record of appeal, the documents involved in the reconstruction of the file has less than 40 normal pages. Particularly with there being modern technology to make copies of those documents, we fail to understand why it took 1½ years to reconstruct the file. There is no suggestion that some of the documents were missing from the respondent's file. If is so, the respondent could easily got them from the appellant or his solicitor. No such request was ever made to the appellant or his solicitor suggesting the documents were available with the respondent all the time. As such we see no reason why it took such a long time for the respondent to file copies of those documents with the registry. In our view, there was inordinate delay on the part of the respondent and his solicitor. In our view, no reasonable excuse had been given for the delay.

It is clear that the onus is on the respondent to justify the delay when the delay has been proved. The relevant principle is stated in the case of *Ratnam v. Cumarasamy & Anor* [1965] MLJ 228 where the Privy Council held that to justify an extension of time for the record there must be material upon the court could exercise its discretion, otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.

In support of the third ground Mr. John Cherryman relies, as I have said, on the language of O. 92 r. 4 which reads as follows:

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The learned judge in the present case held that the striking out jurisdiction in so far as dilatory actions are concerned is governed by the *Birkett v. James* principle as set out in *Vasudevan v. Damodaran*. He held that there is no jurisdiction for striking out an action on the ground of general disinterestedness on the part of a plaintiff. This is how he put it:

Even assuming that the same test applies when the application to strike out a suit is made under O. 34 r. 8(2) or O. 18 r. 19 or the inherent jurisdiction of the court, the law or the test, in my view, must be the one as laid down in *Vasudevan v. T. Damodran* and "general disinterest" irrespective of prejudice is not a ground. Thus when the Federal Court summed up the law as it did, I am of the respectful view that the summary – "Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim" – is incorrect because the law, which the Federal Court attempted to summarise, hitherto contains no provision for striking out on the ground of "general disinterest". Could the Federal Court (in *Public Finance Bhd. v. Natcom Development Sdn. Bhd.*) then be taken to have laid down a new general ground of "general disinterest" for striking out? Though speaking for myself I would rather it did as it would definitely lighten my burden, nevertheless I am of the view that it does not because, as I have said, the law has all this while been as laid down in *Vasudevan v. T. Damodaran* which does not advert to "general disinterest" irrespective of prejudice as a ground and the Federal Court was merely attempting to summarise what had been laid down in *Vasudevan v. T Damodaran* (and other Federal Court cases since that decision) and it made, in my respectful opinion, a wrong summary. The Federal Court if it had intended that there is a new test of "general disinterest" is should have said so expressly but did not so. Thus, I am in agreement with Mr Warren, QC, that there is no such new ground for striking out as "general disinterest" in a case. Therefore such "general disinterest" must be blameworthy within the test laid down by *Vasudevan v. T Damodaran* but, as I have said earlier, the plaintiffs or the solicitors are not to be blamed because they have done all that was required by the RHC and it was entirely the fault of the court registry in not re-fixing the summons for hearing.

It is axiomatic that decisions of the Federal Court are binding on this court and that decisions of this court and of the Federal Court are binding on all court subordinate to them. In my judgment, it was not open to the learned judge to hold that the Federal Court and this court were wrong in the statements of the principles of law they formulated in the two cases just mentioned. In my opinion, the *ratio decidendi* of the Federal Court in *Public Finance Bhd. v. Natcom Development Sdn. Bhd.* [1996] *(supra)* clearly establishes the existence of the power in the High Court to strike out an action upon admitted or proved facts which go to show that a plaintiff is disinterested in pursuing an action he has brought.

Our courts are not prepared – indeed they should not be prepared – to allow files to languish in their registries in respect of which plaintiffs have no real intention of proceeding. I agree with Mr. Cherryman that such conduct would indeed amount to an abuse of process of the court. In my judgment, it is unnecessary for a defendant to show the existence of a collateral purpose in order to establish an abuse of process. Of course if a collateral purpose is established, that in itself would render the action an abuse of process for which it will be liable to be struck out. The decision of the House of Lords in *Grovit v. Doctor* [1997] 2 All ER 417 and of the English Court of Appeal in *Bishop v. Felton & May* (20 June 1997, unreported) and *Governors of the National Heart and Chest Hospital v. Chettle* (28 July 1997, unreported) are illustrative of the exercise of the striking out jurisdiction in this context.

Although the judge was not entitled to do what he did, the question still remains whether his appreciation of the facts in relation to the exercise of the discretion conferred on him was correct. He found, as I have already said, that the plaintiffs had not breached any rules of court. He also found that it was the court which was at fault. He also took into account the grave prejudice suffered by the defendants by the loss of material witnesses. He did undertake a balancing exercise, which brought the scales down firmly in favour of the plaintiffs. Are we in those circumstances entitled to intervene and reverse his decision? I think not.

It has been repeatedly said that this court has no original discretion in an appeal of this nature. Its initial function on appeal is one of review only. It is only after an appellant demonstrates either a serious misdirection by the judge or that the judge has taken into account something that he should not, or that he has failed to take into account something he should have had regard to, or that his order amounts to a miscarriage or failure of justice, that this court would be entitled to intervene and exercise a discretion of its own.

Despite the very careful and lucid arguments of Mr. Cherryman, I remain unconvinced that there has been a wrongful exercise of discretion by the judge in each of these cases. It is very sad that the defendants, and indeed the plaintiffs, have to fight a battle so stale and so late in the day. But that unfortunately is not the fault of the plaintiffs as found by the learned judge. I realise that the findings of fact by the judge have been made on affidavit evidence but I can do no better than remind myself of the judgment of Raja Azlan Shah FJ, (as he then was) in *Samar bte Mansor v. Mustafa Kamarul Arifin* [1974] 2 MLJ 71 where his Lordship said (at p. 72):

> However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge. Thus *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370, is authority for the proposition that an appellate court is not bound by inferences of fact drawn by the trial judge which did not turn on the credibility of witnesses, seen and heard by him, that it may not examine the matter afresh.

It is quite possible that if I or my learned sister or learned brother judges were hearing the applications to strike out, we would have come to a different finding from that of the learned judge. But that is not reason enough to reverse his decision. At the end of the day, I am satisfied that the judge did not materially misdirect himself as to the law or the application of the law to the facts in either Civil Suit No. 351/79 or Civil Suit No. 352/79.

For the reasons already given, I would dismiss these appeals with costs.

There is one other matter I have to deal with. There are two motions before us, one by Mr. Warren to adduce further evidence about backlog of cases in Sabah and another motion by Mr. Cherryman to rebut the evidence put forward in Mr. Warren's motion. With the consent of both counsel we stood down these motions until after arguments as we thought that was the fair thing to do. Since this court is fully cognisant of the state of affairs in Sabah at the material time the introduction of the evidence sought to be introduced is quite unnecessary. For completeness, I would dismiss both motions with no order as to costs.

I express my deep appreciation at the way both appeals have been argued on both sides: with brevity and clarity.

The orders I propose to make are as follows:

1. Both appeals are hereby dismissed;
2. The orders of the learned judge in both appeals are hereby affirmed;
3. The costs of the appeals shall be taxed and paid by the appellants to the respondents. There shall be a certificate for two counsel;
4. The deposits in both appeals shall be paid out to the respondents to account of their taxed costs.

Siti Norma Yaakob JCA:

I concur with the judgment of my learned brother.

Abu Mansor Ali JCA:

I also concur with the judgment of my learned brother which fully expresses my sentiments.